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No. 80-221

In The

Supreme Court of the United States

October Term, 1980

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 775 and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 758,

Petitioners,

– against –

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CHRYSLER CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

In a Title VII employment discrimination action brought by the EEOC against an employer, does Rule 53 of the Federal Rules of Civil Procedure authorize district courts to require unions, joined as defendants under Rule 19(a)(2), to contribute towards the compensation of a special master when (1) the complaint did not allege liability on the part of the unions, (2) no party prevailed against the unions in any respect, and (3) the case was settled by an agreement to which the unions were not parties and under which they received no rights and were subjected to no obligations?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 775 and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 758,

Petitioners,

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CHRYSLER CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners request the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, to review the judgment of

that Court affirming the order of the United States District Court for the Southern District of Ohio requiring petitioners to pay a portion of the compensation of a special master.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals, not yet reported, appears in Appendix A to this petition. The order of the District Court, per Carl B. Rubin, J., requiring petitioners to pay one-third of the special master's compensation, not reported, appears in Appendix B to this petition, and the judgment incorporating the terms of that order, appears in Appendix C. The order appointing the special master appears in Appendix D. The settlement agreement approved by the District Court appears in Appendix E to this petition.

JURISDICTION

The Court of Appeals judgment affirming the District Court's order was entered on May 16, 1980. Jurisdiction in this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

RULE INVOLVED

Rule 53(a) of the Federal Rules of Civil Procedure, relating of the appointment and compensation of masters, provides in relevant part:

> "The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in custody and control of the court as the court may direct."

STATEMENT OF THE CASE

This action was filed by the respondent Equal Employment Opportunity Commission ("EEOC"), under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., against respondent Chrysler Corporation ("Chrysler"), and petitioners International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC, and IUE Locals 775 and 758 ("the Unions"). Jurisdiction in the District Court rested on 42 U.S.C. §2000e-5(f)(3).

The complaint was based on an EEOC charge against Chrysler alleging unlawful employment practices at its Dayton, Ohio facilities. The charge did not name any of the Unions as a respondent, nor did it accuse the Unions of any violations of Title VII. The complaint similarly alleged that Chrysler had violated Title VII by engaging in various practices that discriminated against women in hiring, assignments, promotion, job security, and disability benefits, and did not allege any violations by the Unions.

According to the complaint, the Unions, which are parties with Chrysler to collective bargaining agreements covering employees at the Dayton facilities, were joined as nominal defendants under Rule 19(a)(2) of the Federal Rules of Civil Procedure "in that they have an interest in the outcome of this action." Complaint, para. 11. Consistent with this status, no relief was sought from the Unions, whereas both injunctive and back pay relief was sought from Chrysler.

In response to the complaint, the Unions moved to be realigned as plaintiffs, on the ground that they concurred in the allegations of discrimination against Chrysler, but this motion was denied by the District Court.[1/] In the Unions' answer they "admitted" the substantive allegations of the complaint against Chrysler. The Unions also cross-claimed against Chrysler, reiterating the EEOC's allegations of Title VII violations by Chrysler.

[1/] In an earlier case between the same parties, E.E.O.C. v. Chrysler Corp., 8 FEP Cases 343 (S.D. Ohio 1974), Judge Rubin had granted an identical motion by the IUE and Local 775, finding that the Unions' "real interests lie with that of their members against the alleged unlawful conduct of Chrysler Corporation." Id. at 344.

The Unions' efforts to support the EEOC's case against Chrysler were consistent with the IUE's long-standing affirmative program to combat discrimination against women in the workforce through collective bargaining, legislative and litigation activities. IUE and its local unions have filed and prosecuted more than 50 suits under Title VII, the Equal Pay Act (29 U.S.C. §206(d)) and state fair employment practice laws on behalf of both individual members and the union alleging discriminatory practices by employers.[2/]

[2/] The IUE litigation docket has included many cases against the nation's largest electrical manufacturers, challenging discriminatory assignment, wage, promotion and other practices. See, e.g., General Electric Co. v. Gilbert and IUE, 429 U.S. 125 (1976); Smouse and IUE Local 623 v. General Electric Co., __ F.2d __ (No. 79-2141, 3d Cir. August 5, 1980); IUE v. Westinghouse Electric Corp., __ F.2d __ (Nos. 79-1893, 79-1894, 3d Cir. August 1, 1980), 49 L.W. 2102; Eberts and IUE v. Westinghouse Electric Corp., 581 F.2d 357 (3d Cir. 1978); IUE v. Westinghouse

(2/ continued on next page.)

On August 24, 1976, the Court appointed an attorney in private practice as a special master to hear the case, pursuant to Rule 53 of the Federal Rules of Civil Procedure and 42 U.S.C. §2000e-5(f)(5). The Court's reference provided that if the parties and master were unable to agree upon a reasonable compensation the Court would fix compensation and charge it to such of the parties as it may subsequently determine. Appendix D, p. 11a.

(2/ continued from preceding page.)

Electric Corp., No. 75-62-F (N.D.W.Va.), settlement approved August 23, 1979; Casimer v. General Electric Co., No. C-72-716 (N.D. Ohio), settlement approved May 2, 1979; Local 201 v. General Electric Co., No. 78-1045-Mc (D. Mass.), filed May 12, 1978; IUE v. Westinghouse Electric Corp., 73 F.R.D. 57 (W.D.N.Y. 1976); Grogg v. General Motors, No. 73-Civ. 63 (S.D.N.Y.), filed January 4, 1973.

After several status conferences, and some discovery proceedings between EEOC and Chrysler, EEOC and Chrysler negotiated a settlement agreement, which was approved by the District Court on December 7, 1977. The Unions joined a motion to dismiss on the basis of the settlement agreement, but they did not participate in the formulation of the agreement, nor were they parties to it.[3/] No obligations were imposed on the Unions under the agreement, and the agreement specifically recites that Chrysler would not be required to violate any provision of its collective bargaining agreement in order to comply with the settlement. The Unions obtained no new rights under the settlement agreement, not even the right to enforce

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[3/] The document is entitled "Agreement Between Equal Employment Opportunity Commission and Chrysler Corporation." See Appendix E, p. 12a.

its terms, since the agreement provided that "[i]t is expressly understood that the provisions of this agreement do not grant any rights to any person other than the EEOC." Appendix E, p. 23a.

The EEOC-Chrysler settlement agreement made no provision for payment of the master's fee, although it provided that "[e]ach party agrees to bear its own costs and fees expended in the litigation of the instant action." Id. at p. 23a. On December 28, 1977, the master submitted to all counsel a statement for services in the sum of $2,500. The Unions advised the master and the other parties that they did not consider themselves responsible for payment of any portion of that sum, because (1) they had not been parties to the settlement; (2) no charge of discrimination had been filed against them with the EEOC; and (3) no violation of Title VII had been alleged against them or determined to exist during the course of the action. When agreement among the parties could not be reached the matter was submitted to Judge Rubin for his determination.

On May 31, 1978 the District Judge issued an Order setting compensation for the master at $2,500 and taxing the EEOC, Chrysler and the Unions each with one-third of that amount. The only explanation for the decision was that the Unions had "participated" in the action. Appendix B, p. 7a.

On May 16, 1978 the Court of Appeals affirmed on the basis of the Unions' activity in the litigation as noted by the District Court. Appendix A, pp. 3a-4a.[4/]

[4/] On June 16, 1980 the EEOC filed a motion for publication of the Court of Appeals' Order, on the grounds that "[p]ublication of the judgment is necessary to clarify the law, particularly in light of the frequency with which the issue is likely to arise." On July 28, 1980 that motion was granted, and the May 16th Order was reissued as a per curiam decision.

REASONS FOR GRANTING CERTIORARI

The decisions of the courts below, authorizing the taxation of the fee of a special master against a party, without any adjudication of fault, raise a novel and "important question of federal law which has not been, but should be, settled by this Court...." Rule 17.1(c), Rules of the Supreme Court. Taxation under Rule 53 of the fee of a master, without any basis in the taxed party's unsuccessful litigation of any issue, or in the manner in which it conducted the litigation, raises substantial questions both as to the authority for the promulgation of the Rule and as to whether the Rule, as so interpreted, sanctions a denial of property without due process of law. While the precise question presented as to the construction of Rule 53 is novel, the decisions below were far out of line with accepted norms applicable to the imposition of costs or other money judgments in the federal courts, thus

requiring this Court's exercise of its supervisory powers. Rule 17.1(a), Rules of the Supreme Court.

In the particular context of litigation under Title VII of the Civil Rights Act of 1964, the lower court's assessments of costs based on "participation" will have a destructive impact on the important role played by unions in the enforcement of that Act. The policy issues raised by the petition are thus related to those to be considered by the Court next Term in connection with Northwest Airlines v. Air Line Pilots Association, No. 79-1056, cert. granted, 48 U.S.L.W. 3821 (June 16, 1980).

A. Interpretation of Rule 53

While the precise question raised by the petition has not previously been decided, we are aware of no other situation in which a court has been found to have the power to hold a party

liable for the payment of money solely because it participated in litigation. It is a fundamental tenet of American jurisprudence that no person may be adjudged liable for the payment of money without justification grounded in that person's conduct or breach of duty. This proposition appears to be so universally accepted that the opportunity for judicial precedent speaking to the issue has not arisen.

Thus, money damages awarded under governing substantive law must be based on a finding of a violation of law or breach of duty to the plaintiff. An order requiring one party to pay the litigation costs of another party requires a determination that the latter party "prevailed" against the former. See Rule 54(d), F. R. Civ. P. Where authorized by statute or one of the exceptions to the so-called American rule, attorneys' fees may be assessed against the losing party in favor of a party that has "prevailed." See, e.g., Christiansburg Garment Co., v. E.E.O.C.,

434 U.S. 412 (1978); Hanrahan v. Hampton, __ U.S. __, 100 S.Ct. 1987 (1980); Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). And, costs and attorneys' fees may be assessed against parties or attorneys in appropriate cases because of their dilatory conduct of the litigation. See, e.g., Roadway Express v. Piper, __ U.S.__, 48 U.S.L.W. 4836 (June 23, 1980); Hall v. Cole, 412 U.S. 1, 15 (1973). The decision below, relying on no conduct of the Unions other than their appearance and participation in the lawsuit, may thus be seen as an unprecedented departure from the norms generally applicable to the entry of money judgments against parties to federal litigation.

The only possible authority for the unorthodox assertion of judicial power by the lower courts in this case is Rule 53. Rule 53 does not by its terms provide any standard against which district courts are to determine which parties to an action must pay for

the cost of a special master. It provides only that the master's compensation "shall be charged upon such of the parties ... as the court may direct." Rule 53(a), F. R. Civ. P. In affirming the order compelling petitioners to pay a pro rata share of the master's fee, for no reason other than the participation by petitioners in the litigation prior to the settlement between respondents, the Court of Appeals in effect construed the broad language of Rule 53 as providing virtually unlimited discretion to impose the cost of the reference on any party, without regard to fault or lack of success on the merits.

It is inconceivable that this Court, in its adoption of Rule 53, either sought to engage in such "standardless judicial lawmaking," Roadway Express, Inc. v. Piper, supra, 48 U.S.L.W. at 4839, or, more particularly, to authorize the imposition of potentially substantial monetary liability on persons solely because they are made parties

to the litigation.[5/] Indeed, it is doubtful whether the enabling statute authorizing the promulgation of the Federal Rules would support such an interpretation of Rule 53 since it provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072. Nor does the taxation against petitioners of part of the cost of the master lie within any inherent power of the federal courts, since any such powers are limited to "those 'which are necessary to the exercise of all others.'" Roadway Express, Inc. v. Piper, supra, 48 U.S.L.W. at 4839.

Rule 53 was patterned after old Equity Rule 68, see Wright and Miller, Federal Practice and Procedure: Civil § 2607 (1971 ed.), and this Court

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[5/] While the master's fee is relatively small in this case, in other cases it might be quite substantial. See, for example, Reed v. Cleveland Board of Education, 607 F.2d 737 (6th Cir. 1979), reducing an award of approximately $700,000 to approximately $300,000.

undoubtedly intended it to be interpreted as requiring the exercise of the district court's judgment as to which parties should bear the burden of the master's compensation, based on the equitable circumstances of the particular case. Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). In exercising that judgment, district courts must be required to identify a principled basis upon which a party may be ordered to make payment to the master, grounded in the outcome of the litigation or the taxed party's conduct of the lawsuit, and not merely on the fact of participation.

For example, a party that has unsuccessfully asserted a claim or defense might be required to pay all or part of the master's fee. See, e.g., Badger By-Products Co. v. Employers Mutual Casualty Co., 64 F.R.D. 4 (E.D. Wisc. 1974), aff'd, 519 F.2d 1406 (7th Cir. 1975). This would be consistent with Rule 54(d), which provides for the taxation of costs in favor of a "pre-

vailing party"[6/] and would reasonably allocate the expense by, in effect,

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[6/] The cost of a reference has generally been held to be taxable under Rule 54(d) in favor of the "prevailing party." See, e.g., Carpa v. Ward Foods, 567 F.2d 1316, 1324 (5th Cir. 1978); K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 476 (9th Cir. 1974). Costs under Rule 54(d) may be denied to the prevailing party only if some special reason to do so is found to exist, since the denial is in the nature of a "penalty" against the prevailing party. See, e.g., True Temper Corp. v. C.F. & I. Steel Corp., 601 F.2d 495 (10th Cir. 1979); Walters v. Roadway Express, 557 F.2d 521, 526 (5th Cir. 1977); Popeil Brothers v. Schick Electric, Inc., 516 F.2d 772, 775 (7th Cir. 1975); Lewis v. Pennington, 400 F.2d 806 (6th Cir.), cert. denied, 398 U.S. 960 (1968). Indeed, the Unions can argue persuasively that they were "prevailing parties" who would be entitled to an award of costs under Rule 54(d). In its Court of Appeals brief in this case, the EEOC conceded that "[t]he union may very well have been a prevailing party in the sense that the settlement made it unnecessary for the union to change its collective bargaining agreement. Brief for the EEOC, p. 6, n. 2.

"penalizing" unmeritorious litigation. The Unions were not unsuccessful in any aspect of the litigation.[7/]

[7/] No allegations of discrimination were levied against the unions and, of course, none were proven. The Unions were joined under Rule 19(a)(2), presumably because their interest in the litigation might have been impeded without their participation, and because of the possibility of obligations being imposed upon Chrysler by a decree that was inconsistent with the collective bargaining agreement. Because of the settlement, these potential union interests were never implicated by the litigation, and the joinder of the Unions proved unnecessary. Cf. Teyas Development Co. v. McGough Bros., 167 F.2d 268 (5th Cir. 1948)(costs awarded against a defendant, in favor of a third party defendant. Since the plaintiff's claim had been unsuccessful, the defendant's third party claim became unnecessary, and thus to that extent the third party defendant "prevailed.") The Unions' activities in support of the EEOC's

(7/ continued on next page.)

Alternatively, a required contribution towards the cost of a master might be reasonable where the manner in which the litigation was conducted justifies such an assessment. Thus, a party that requested a reference that proved unnecessary, see Gold Seal Importers v. Morris White Fashions, 152 F.2d 660 (2d Cir. 1948), or otherwise added to the expense of the reference by dilatory behavior, cf. McFarland v.

(7/ cont'd from preceding page.)

allegations were neither successful nor unsuccessful because of the termination of the controversy by the EEOC-Chrysler settlement, in which the Unions did not participate during negotiations, were not signatories, and did not derive rights or suffer obligations thereunder.

Gregory, 425 F.2d 443, 449 (2d Cir. 1970), might fairly be assessed a share of that expense. No such finding was made or could have been made against petitioners.[8/]

In sum, the Court of Appeals' application of Rule 53 raises serious questions as to the authority of this Court to promulgate a rule that imposes, in effect, a "user tax" on involuntary federal litigants, and as to the constitutionality under the due process clause of a rule that deprives litigants of property without any basis for a finding of liability. Cf. Thompson v. City of Louisville, 362 U.S. 199 (1960). The Court's intervention is needed to clarify that the discretion conferred by Rule 53 is

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[8/] Petitioner's participation was not found to be a factor in unnecessarily adding to the master's fee, and therefore the assessment against them was not in the nature of a penalty. Indeed, both lower courts conceded that the extent of participation before the master was unknown. Appendix A, p. 3a-4a; Appendix B, p. 7a.

more limited and defined than the Court of Appeals assumed.[9/]

B. Impediment to Title VII Enforcement

A construction of Rule 53 that would permit the taxation of the cost of a special master against a party based solely on that party's activity in the lawsuit would be especially destructive of union efforts to assist private plaintiffs and the EEOC in the enforcement of Title VII. Unions are often joined as defendants in Title VII lawsuits by the EEOC and other plaintiffs, not because of any alleged culpability for discriminatory practices, but because of the unions' interest in the

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[9/] Under petitioners' proferred construction of Rule 53, the cost of the master should be borne by the EEOC or by Chrysler, depending on which party is determined to have prevailed in light of the terms of the settlement, cf. Maher v. Gagne, __ U.S. __, 48 U.S.L.W. 4891 (June 25, 1980), or split between them if they are both determined to have prevailed in part, see Dyker Bldg. Co. v. United States, 182 F.2d 85 (D.C. Cir. 1950).

litigation. See Rule 19(a)(2), F. R. Civ. P.[10/] In such suits, courts are sometimes required to interpret applicable collective bargaining agreements,

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[10/] See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 356 n. 43 (1977); E.E.O.C. v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975); E.E.O.C. v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974); Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974); Coker v. Marmon Group, 455 F.Supp. 398 (D.S.C. 1978); Holden v. H.J. Heinz, 21 FEP Cases 175 (W.D. Pa. 1977); E.E.O.C. v. Blanton Plow Co., 18 FEP Cases 506 (N.D. Ga. 1976); Mills v. International Paper Co., 14 FEP Cases 926 (W.D. La. 1976); Williams v. Southern Railway System, 15 FEP Cases 959 (S.D. Ohio 1976); Hardy v. Bucyrus-Erie Co., 398 F.Supp. 64 (E.D. Wisc. 1975); E.E.O.C. v. Braswell Motor Freight Lines, Inc., 8 FEP Cases 754 (N.D. Tex. 1974); E.E.O.C. v. Painters Local 857, 384 F.Supp. 1264 (D.S.D. 1974); E.E.O.C. v. Rexall Drug Co., 10 FEP Cases 450 (E.D. Mo. 1974); Held v. Missouri Pacific Railroad Co., 373 F.Supp. 996 (S.D. Tex. 1974); Hodgson v. School Board, 56 F.R.D. 393 (W.D. Pa. 1972).

or order remedies contrary to the terms of such agreements or otherwise affecting union members' interests, in order to provide full and effective relief to discriminatees against the offending employers. See E.E.O.C. v. MacMillan Bloedel Containers, Inc., supra. Presumably in this case the EEOC believed that Chrysler's allegedly discriminatory promotion, transfer, recall or disability policies might require remedial action at odds with petitioner's collective bargaining agreement with Chrysler.

Once joined in the action, unions have an opportunity to use their day to day knowledge as to the employment practices in the workplace, expertise and practical experience to contribute significantly to the plaintiff's success and thus to the enforcement of Title VII. See International Woodworkers of America v. Georgia Pacific Corp., 568 F.2d 64, 67 (8th Cir. 1977); Local 194 v. Standard Brands, Inc., 540 F.2d 864, 866 (7th

Cir. 1976); IUE v. Westinghouse Electric Corp., 73 F.R.D. 57, 59 (W.D.N.Y. 1976). This is precisely what the unions attempted to do in this case, consistent with IUE's overall advocacy program to eliminate invidious discrimination against members of bargaining units which they represent. Petitioner's participation in this litigation in support of the EEOC undoubtedly would have been a substantial benefit to the plaintiff, the employees and the court had the case gone through more complete discovery and trial. Unions generally should be encouraged to support the enforcement of the Act. See EEOC BACKGROUND PAPER AND RESOLUTION TO ENCOURAGE VOLUNTARY AFFIRMATIVE ACTION IN COLLECTIVE BARGAINING, BNA Daily Labor Reports, No. 65, p. D-1, April 2, 1980.

The decision of the Court below will have exactly the opposite effect. The threat of liability for a master's fee premised solely on union participation in support of a Title VII plaintiff, particularly in a case where no claim for relief is asserted against

the union,[11/] will tend to deter union support for the discrimination claim. Rather, unions would be encouraged to take a passive role, unless and until their contractual interests are implicated in the litigation. Under the lower courts' rulings, this could free them from the risk of monetary liability. See E.E.O.C. v. MacMillan Bloedel Containers, Inc., supra, 503 F.2d at 1095. This potential liability for costs is especially significant because of the statutory authorization for reference of Title VII litigation to special masters, solely as a means of expedition, and without regard to exceptional circumstances. See 42 U.S.C. §2000e-5(f)(5). Compare Rule 53(b), F. R. Civ. P.; La Buy v. Howes Leather Co., 352 U.S. 280 (1957).

[11/] Indeed, lower courts have held consistently that parties not named in the EEOC charge, like petitioners, may not be subject to monetary liability under Title VII. Glus v. G.C. Murphy Co., 562 F.2d 880, 885 (3d Cir. 1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); E.E.O.C. v. MacMillan Bloedel Containers, Inc., supra, 503 F.2d at 1092-93.

This case therefore raises an issue closely related to an issue presented in Northwest Airlines v. Air Line Pilots Association, supra, which will be argued next Term. In Northwest, petitioner is an employer found, in a prior case, to have violated Title VII, because of provisions in its collective bargaining agreement with the union. The employer claims a right to contribution against the respondent union, which was not joined in the original suit. In Northwest, this Court will consider the impact of an implied right of contribution on union efforts to ferret out discriminatory practices and assist members in prosecuting their grievances. Certainly, in the context of this case, where there has not been so much as an allegation of unlawful conduct by the Unions, the policies of Title VII bar the imposition of costs against the Unions based on their efforts to assist in the enforcement of the Act.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

Dated: August 14, 1980

APPENDICES

TO BE PUBLISHED

FILED
MAY 16 1980
JOHN P. HEHMAN, Clerk

No. 78-3394

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee, CHRYSLER CORPORATION, Defendant-Appellee, v. INTERNATIONAL UNION OF ELECTRIC, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, LOCAL 758; INTERNATIONAL UNION OF ELECTRIC, RADIO AND MACHINE WORKERS, AFL-CIO, CLC and LOCAL 775; INTERNATIONAL UNION OF ELECTRIC, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, Defendants-Appellants.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: LIVELY and MARTIN, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. The Equal Employment Opportunity Commission filed an action

against Chrysler Corporation and the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, and IUE Locals 775 and 758 (Unions), pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The Unions, parties to a collective bargaining agreement with Chrysler, were named as nominal defendants under Rule 19(a)(2), Fed. R. Civ. P., "in that they [had] an interest in the outcome of the action."

Pursuant to an order, a Special Master was appointed to hear the case pursuant to Rule 53, Fed. R. Civ. P., and 42 U.S.C. § 2000e-5(f)(5). The order and expenses, to which no objections were filed, directed the parties to pay him a reasonable compensation. A settlement agreement was reached between Chrysler and EEOC which was approved by the district court. The Master assessed a $2,500 fee for his services, with each party taxed one-third of that amount.

The Unions appeal the assessment levied against them, claiming that mere participation in the action did not justify assigning liability for costs. The

Unions argue that no relief was sought from them and that no liability could have resulted under their "nominal" status. Generally, fees are includable as costs under Rule 54(d), Fed. R. Civ. P., subject to the discretion of the trial court. See K-2 Ski Company v. Head Ski Company, Inc., 506 F.2d 471 (9th Cir. 1974). Our review is limited to determining whether the district court abused its discretion in assessing the $2,500 fee in equal portions among the parties. Lewis v. Pennington, 400 F.2d 806 (6th Cir.), cert. denied, 393 U.S. 983 (1968).

As noted by the district court, the Unions took an active part in the litigation: they sought to realign themselves as plaintiffs to the action, filing a memorandum in support thereof and motion for reconsideration; they appeared at a preliminary pretrial conference, filed an answer to the complaint and stipulated as to the dismissal of a party defendant. They also did not file objections to the order appointing the Master. The Union also filed a memorandum opposing Chrysler's motion to dismiss. The district court admitted not knowing the extent of the

Union's participation before the Master; but from this review, it is obvious that they were active litigants. There has been no showing that the district court abused its discretion in assessing the $833.33 fee against the Unions. The judgment of the district court is therefore affirmed. See United States v. Masonry Contractors Association of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974).

FILED
JOHN D. LYTER, CLERK
MAY 31 3 19 PM '78
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff

v. No. C-3-75-243

CHRYSLER CORPORATION,
et al,

Defendants

O R D E R

This matter is before the Court on advice of counsel that such counsel are unable to agree on an appropriate distribution of the compensation to be paid the Master appointed August 24, 1976.

The order appointing the Master contains the following:

APPENDIX B

> The parties will pay a reasonable compensation and expenses to such Master. In the event the parties and the Master are unable to agree upon such sum, the Court will fix compensation and expenses and charge it to such of the parties as the Court may determine.

Defendant International Union of Electrical Radio and Machine Workers, AFL-CIO, asserts that it should not pay any portion of the fee. An examination of the pleadings in this matter indicated the following: This defendant moved for realignment (Document No. 9); appeared at a preliminary pretrial conference; filed a memorandum in support of its motion (Document No. 13); moved for reconsideration with an eight-page memorandum (Document No. 18); filed an answer (Document No. 29); stipulated as to the dismissal of Fedders, Inc. (Document No. 35); and filed a memorandum contra to defendant Chrysler's motion to dismiss (Document No. 36).

This Court has no means of knowing the extent of this defendant's participation before the Master but it appears that the participation in terms of pleadings before this Court was significant.

Accordingly, the Court finds that an appropriate compensation for the Master is Two Thousand, Five Hundred Dollars ($2,500.00), one-third of which shall be paid by each of the parties; to wit, Equal Employment Opportunities Commission, Chrysler Corporation, and the International Union of Electrical Radio and Machine Workers, AFL-CIO.

It is so ORDERED.

/s/ Carl B. Rubin
United States District Judge

FILED
JOHN D. LYTER, CLERK
JUN 26 1 33 PM '78
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF OHIO

CIVIL ACTION FILE NO. C-3-75-243

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs. JUDGMENT

CHRYSLER CORPORATION, ET AL.,

Defendant.

This action came on for ~~xxxxx~~ (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly ~~xxxxx~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the appropriate compensation for the Master is Two Thousand, Five Hundred

Dollars ($2,500.00), one-third of which shall be paid by each of the parties; to wit, Equal Employment Opportunities Commission, Chrysler Corporation, and the International Union of Electrical Radio and Macine Workers, AFL-CIO.

Dated at Dayton, Ohio, this 26th day of June, 1978. AND FILED AND ENTERED NUNC PRO TUNC AS OF the 31st day of May, 1978.

JOHN D. LYTER
Clerk of Court

/s/ Rebecca E. Anderson,
Deputy

FILED
JOHN D. LYTER, CLERK
AUGUST 24, 1976
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff

v. No. C-3-75-243

CHRYSLER CORPORATION,
et al.,

Defendants

ORDER APPOINTING MASTER

This matter is before the Court following advice from counsel that the above matter should be heard by a Master Commissioner. The issues involved in the above-entitled action are concerned with matters involving civil rights as defined in 42 U.S.C. §2000e. The appointment of a Master would eliminate duplication and save

substantial judicial time. This case has not been scheduled for trial within one hundred twenty (120) days after issue was joined.

Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does hereby appoint S. ARTHUR SPIEGEL, Esq. to serve as a Master in the above-entitled cause. Such Master is directed to hold hearings, receive evidence and report to the Court in accordance with 42 U.S.C. §2000e. In the performance of this function, such Master shall have all powers set forth in Rule 53(c) of the Federal Rules of Civil Procedure.

The parties will pay a reasonable compensation and expenses to such Master. In the event the parties and the Master are unable to agree upon such sum, the Court will fix compensation and expenses and charge it to such of the parties as the Court may determine.

It is so ORDERED.

/s/ Carl B. Rubin
United States District Judge

FILED
JOHN D. LYTER, CLERK
DEC 7 10 51 AM '77
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	:	CIVIL ACTION NO.
Plaintiff	:	C-3-75-243
- vs -	:	
CHRYSLER CORPORATION, et al.	:	
Defendants	:	

AGREEMENT BETWEEN
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND
CHRYSLER CORPORATION

This action was instituted by the Equal Employment Opportunity Commission ("EEOC") against Chrysler Corporation ("Chrysler") seeking relief for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e, et seq., as amended by Public Law 92-261

APPENDIX E

(March 24, 1972)("Title VII"). The International Union of Electrical, Radio and Machine Workers, and Locals 775 and 758 thereof ("Union") are joined as parties defendant pursuant to Rule 19 of the Federal Rules of Civil Procedure.

The parties to this action, being desirous of resolving the issues and claims in the dispute between them as alleged in the pleadings filed herein, hereby agree as follows:

1. It is expressly understood that this agreement shall apply only to the EEOC and Chrysler's Dayton Plant I located at Dayton, Ohio.

2. This agreement shall be for a term of three (3) years from the date of the execution thereof. Neither this agreement, nor any action taken by Chrysler toward compliance with its terms, constitutes an admission of any kind by Chrysler to the effect that Chrysler, its officers, agents or employees have in the past violated or presently are violating Title VII or have not otherwise been in compliance with Title VII or any other applicable law, regulation or order.

3. In consideration of the execution of this agreement by Chrysler, the EEOC hereby waives, releases and covenants not to sue Chrysler with respect to the claims and issues alleged in Paragraphs 14(a) through 14(f) of the Complaint, as amended, in this action. This agreement, furthermore, resolves all charges of discrimination based on said claims and issues which were pending with the EEOC prior to the date of this agreement, none of which will hereafter be the basis of any court actions instituted, or court pleadings filed by the EEOC against Chrysler. In addition, if the EEOC should reopen any other charges of discrimination against Chrysler's Dayton Plant I based on said claims and issues that it closed administratively prior to the date of this agreement, any such charge may not hereafter be the basis of any court actions instituted or court pleadings filed by the EEOC against Chrysler.

4. This agreement applies to all job classifications, departments, lines or progressions and job vacancies under any collective bargaining agreement between Chrysler and the Union at Chrysler's Dayton Plant I and does not apply to those supervisory,

management and clerical-engineering; technical positions which are not covered by any collective bargaining agreement. This agreement does not require Chrysler to violate any provisions of any current collective bargaining agreement between it and the Union.

5. Chrysler agrees that there will be no discrimination or retaliation of any kind against any person or persons because of their previous opposition to any practice alleged unlawful in this action, or because of the filing of a charge covered by this agreement or the giving of any testimony or assistance, or any other form of participation in the investigation thereof, or because of any assertion of rights granted under this agreement that are not otherwise granted by Title VII.

6. Chrysler agrees to appoint within thirty (30) days of the execution of this agreement an individual whose responsibility it will be to implement and administer the terms of this agreement. Chrysler will provide the EEOC with the name, title and employment history of this individual.

7. Chrysler agrees that at Dayton Plant I, during the term of this agreement, it will use its best efforts to increase the percentage of female employees in its work force. Chrysler will adopt the following hiring policies for the following job categories:

A. Semi-skilled hourly rated employees: The annual percentage of female employees hired compared to the number of female applicants will be substantially the same as the percentage of male employees hired when compared to the number of male applicants provided; however, in no case will the number of female employees hired be less than sixteen and six tenths percent (16.6%) of the total of all newly hired employees.

B. Craftsmen-skilled trades: In recognition of the low female availability for employment in the skilled trades, it is acknowledged that the annual percentage of female employees hired in these categories will necessarily be substantially less than the projected goal of sixteen and six tenths percent (16.6%)

of the total of all new employees hired. Therefore, it is agreed that Chrysler, when it recruits for skilled trades classifications, will take those steps described in Paragraph 15 as are appropriate to encourage qualified female craftsmen to apply, and on each occasion that it fails to hire a female who applies for employment in a skilled trades classification, it will maintain a written record of the specific reason for so doing.

8. The hiring rate percentages set forth in Paragraph 7, supra, are intended to apply only in the event Chrysler hires new employees and said percentages are not to be construed to require Chrysler to hire any particular female applicant.

9. Chrysler agrees actively to seek out female applicants for employment from all available sources in the Dayton area. Chrysler further agrees that when advertising for new employees in newspapers and any other publications, it will state in its advertisements that it is an "Equal Opportunity Employer".

10. Chrysler's compliance with the provisions of this agreement shall not be judged solely by whether or not it reached the goals set forth in Paragraph 7, supra; rather, Chrysler's performance of its obligation to use its best efforts to achieve such goals shall be measured by the number of employment openings that materialize at the Dayton Plant I as a result of the normal conduct of Chrysler's business and by the number of qualified female applicants available to fill such openings.

11. Chrysler agrees that all hiring, job assignment, transfer, promotion, lay-off and recall practices at its Dayton Plant I shall be maintained and conducted in a manner that does not discriminate on the basis of sex in violation of Title VII, and in particular, agrees that it will continue to:

A. Hire any applicant for employment and promote, assign, transfer, lay-off or recall any employee without regard to that individual's sex.

B. Provide equal employment opportunity without limiting, segre-

gating or classifying its employees at its Dayton Plant I in a way that could deprive any individual of employment opportunities or otherwise affect her status as an employee because of such individual's sex.

12. If a female applicant for employment is not rejected or hired, her application will be placed in an active file for a period of one year from the date of the application.

13. Commencing March 1, 1979 and on March 1 of each succeeding calendar year thereafter until the expiration of this agreement, Chrysler shall submit a report to Mrs. Odas Nicholson (or her successor), Chicago Regional Office of the General Counsel, 55 East Jackson Boulevard, Suite 1401, Chicago, Illinois 60604 containing the following information for the period as of December 31 of the preceding calendar year:

A. A statement as to all efforts made to recruit female employees.

B. A statistical report of the number of male and female applicants

for employment at Dayton Plant I during the reporting period together with the number of such male and female applicants who were hired.

C. A statistical report of the number of applicants for transfer or promotion during the reporting period together with the number of such applications received from female employees.

14. In addition to filing the reports specified in Paragraph 13, supra, Chrysler agrees that it will retain and hold available for inspection by the EEOC for a period of one hundred twenty (120) days following submission of the annual report specified in said Paragraph 13 the following materials:

A. Every application for employment received by Chrysler at its Dayton Plant I.

B. Every application for transfer or promotion received by Chrysler from its employees at Dayton Plant I.

C. All records used as a basis for the reports required by this

agreement and such other related employment records as may be maintained with respect to all employees or applicants for employment.

15. Chrysler will make a good faith effort to locate potential female applicants for employment. To do so, Chrysler will undertake the following steps:

A. Chrysler shall contact on a regular basis as appropriate hiring opportunities occur sources of potential female employees in the Dayton area.

B. Chrysler shall contact on a regular basis as appropriate hiring opportunities occur, the high schools, vocational schools, and technical schools in the Dayton area for the purpose of seeking prospective female applicants.

C. Chrysler will continue on behalf of Dayton Plant I to make a good faith effort to identify hourly rated semi-skilled female employees with supervisory poten-

tial, and shall consider them for appointment to available supervisory positions as forepersons.

16. Within ninety (90) days following the execution of this agreement, Chrysler will mail to each hourly female employee currently employed at Dayton Plant I a copy of this agreement together with a copy of the provisions of the appropriate collective bargaining agreement dealing with the transfer and promotion of employees within said Dayton Plant I and a covering letter calling attention to those provisions. A copy of such letter, as sent, will be provided to the EEOC. In addition, a copy of this agreement will be on file in the personnel office of Dayton Plant I for inspection and review by any employee.

17. If at any time during the term of this agreement, any instances or allegations of non-compliance or breach thereof comes to the attention of the EEOC, Chrysler shall be so notified in writing and asked immediately to investigate the situation. If such instance or allegation is not resolved to the satisfaction of the EEOC within sixty (60) days of Chrysler's

receipt of such notice, the EEOC may seek redress with the United States District Court for the Southern District of Ohio at Dayton, Ohio, for whatever relief is necessary to remedy, the alleged non-compliance or breach. It is expressly understood that the provisions of this agreement do not grant any rights to any person other than the EEOC. To effectuate this provision, Chrysler and the EEOC hereby agree and stipulate that the aforesaid District Court shall have jurisdiction over the subject matter and the parties with respect to the filing of any such action. Chrysler hereby designates the law firm of Coolidge, Wall, Matusoff, Womsley & Lombard Co., L.P.A., Suite 600 IBM Building, Dayton, Ohio 45402 as its statutory agent for the purpose of accepting service of process on its behalf with respect to the filing of any such action.

18. Each party agrees to bear its own costs and fees expended in the litigation of the instant action.

19. At reasonable times during the term of this agreement, Chrysler agrees to

allow representatives of the EEOC, during normal business hours and upon the giving of reasonable notice, to inspect and copy any of its employment records and related documents for the purpose of establishing whether or not Chrysler is in compliance with the terms and conditions of this agreement.

/s/ Judge Rubin
United States District Judge

NO. 80-221

SEP 17

MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 775 and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 758,

Petitioners,

-against-

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CHRYSLER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT, CHRYSLER CORPORATION, IN OPPOSITION

COOLIDGE, WALL, MATUSOFF, WOMSLEY & LOMBARD CO., L.P.A.

By: Hugh E. Wall, Jr.
(Counsel of Record)

Suite 600 IBM Building
Dayton, Ohio 45402
Phone: 513/223-8177

ATTORNEYS FOR RESPONDENT CHRYSLER CORPORATION

Dated: September 17, 1980

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

The Respondent, Chrysler Corporation, objects to the Question Presented by Petitioner and submits that the Question Presented is instead:

> Does a Trial Court abuse its discretion granted under Rule 53 of the Federal Rules of Civil Procedure when it orders a party who significantly participated in the pleadings before the Court to bear an equal share of the compensation ordered a Master?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-221

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 775 and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 758,

Petitioners,

-against-

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CHRYSLER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT, CHRYSLER CORPORATION, IN OPPOSITION

OPINIONS BELOW

The opinions delivered in the courts below are not yet reported but are appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

RULES INVOLVED

Respondent agrees with Petitioner's reference to Rule 53 (a) of the Federal Rules of Civil Procedure but submits that Rule 54 (d) is also at issue in pertinent part:

> " (c) osts shall be allowed as of course to the prevailing party unless the court otherwise directs."

STATEMENT OF THE CASE

Respondent Chrysler Corporation ("Chrysler") agrees to the first three paragraphs of the Petitioner's Statement of the Case, except to note that the Unions were joined as parties pursuant to paragraph 10 of the Complaint.

Chrysler also agrees that the Unions moved to be realigned as plaintiffs, but objects to their footnote 1 as irrelevant to the question before this Court. Chrysler filed a memorandum contra the motion of the Unions to be realigned as party plaintiffs. Chrysler noted that none of the grievances which were appealed by the Unions to the appeal board concerned alleged discrimination because of sex.[1] Chrysler further argued that if discrimination had oc-

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[1] The Union's attempt to associate themselves with discrimination suits filed by the international IUE is absurd when the record of the locals is reviewed. The Unions have replied piously that they avoided taking grievances to binding arbitration because this would have jeopardized their members' rights under the Doctrine of *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1971). However, despite the repudiation of *Dewey* in *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36 (1974), the Unions still failed to process a single case of alleged sex discrimination.

curred against members of the Unions, the Unions were jointly liable with Chrysler, and the Unions should remain party-defendants.

The District Court denied the Unions' motion for the reasons stated in Chrysler's memorandum. Later, the Unions moved for reconsideration of their motion to be realigned as plaintiffs, and again the District Court denied the motion. Chrysler agrees that the Unions admitted the allegations of the complaint and cross-claimed against Chrysler. Chrysler answered the cross-claim of the Unions, and stated in part that the Unions could not recover as to the extent any discrimination existed, it was as a direct result of collective bargaining agreements which the Unions had negotiated.

Chrysler moved to dismiss certain claims of the EEOC's complaint, and of the Unions' cross-claim regarding pregnancy benefits. The Unions filed a memorandum contra to Chrysler's motion to dismiss and stated that they intended to file interrogatories to Chrysler.

Chrysler agrees that a master was appointed with the provision that if the parties were unable to agree, the District Court would charge his compensation as it subsequently determined. Chrysler agrees that the settlement agreement appended to the Petition is accurate, but notes that said agreement recites that the Unions were joined as "parties" to the action, and that they joined in a motion to approve the agreement. The joint motion stated that the agreement resolved all matters in controversy between the "parties." The EEOC-Chrysler settlement agreement provided that "Each party agrees to bear its own costs and fees expended in the litigation of the instant action." Appendix E to petition, page 23 (a).

After the settlement agreement was filed, the Unions

requested from Chrysler copies of the reports which the agreement required to be submitted to the EEOC.

After the master had submitted his statement for services, Chrysler's attorney, Roger J. Makley, obtained a commitment by telephone from Richard F. Rice, an attorney for the Unions, that the Unions were agreeable to paying one-third of the master's fee. Shortly thereafter, Richard B. Sobol, another attorney for the Unions, responded by letter that Mr. Rice had made no such commitment and that it was the Union's position that they should not bear any portion of the expenses. When agreement among the parties could not be reached, the matter was submitted to Judge Rubin for his determination.

Chrysler agrees that the opinions of the District Judge and the Court of Appeals appended to the petition are accurate, but notes that the opinion of the District Judge was that the "participation in terms of pleading before this court was significant." Petition Appendix B, (p. 7 (a).

REASONS FOR NOT GRANTING CERTIORARI

The Petition should be denied because it does not include proof of service and only one copy was served upon Chrysler. Rule 28, Rules of the Supreme Court, requires that proof of service be noted and that three (3) copies of a document produced under Rule 33 be served on each party. A petition for a writ of certiorari is a document produced under Rule 33.

The Petition also should be denied because there is insufficient reason to hear it.

Rule 17.1, Rules of the Supreme Court, provides: " (a) review on writ of certiorari is not a matter of right but

of judicial discretion, and will be granted only when there are special and important reasons therefor."

No constitutional issue is presented by the Petition. Instead, the Unions argue that "an important question of federal law" is raised. Chrysler submits that the issue presented is simply one of the trial court's discretion.

In *United States* v. *Nobles,* 422 U.S. 225, 241 (1975), this court noted in footnote 16 that the respondent argued that the trial judge erred in his exclusion of purported expert testimony.

> ". . . (w) e do not consider these contentions worthy of consideration. Each involves an issue that is committed to the trial court's discretion. In the absence of a strong suggestion of an abuse of that discretion or an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them."

Rule 53 (a) F.R.Civ.P. states the master compensation "shall be charged upon such of the parties . . . as the court may direct." This plainly leaves the matter within the discretion of the district court. The Unions argue that the district court abused its discretion because Rule 54 (d) F.R.Civ.P. provides that costs shall be allowed to the prevailing party. However, the Unions omit the full quotation which is: ". . . (c) osts shall be allowed as of course to the prevailing party *unless the court otherwise directs.*" (emphasis added). Hence, Rule 54 (d) F.R.Civ.P. also leaves the ultimate decision to the district court's discretion. See *K-2 Ski Company* v. *Head Ski Company, Inc.,* 506 F.2d 471 (9th Cir. 1974).

The record plainly supports the district court's judgment that the Unions actively participated in the lawsuit.

The Unions also shared with Chrysler the responsibility for any violations alleged by the EEOC inasmuch as they had negotiated the collective bargaining agreements. Hence, the Unions were as much responsible as Chrysler for the existence of the lawsuit and the subsequent reference to a master. If the EEOC action had been dismissed, the EEOC might have been found liable for all costs. However, since the suit was settled by an agreement in which the Unions concurred, the district court considered it appropriate to divide the costs equally between the three parties.

Numerous cases have required the parties to share the master's fee. See e.g., *Bowen Motor Coaches* v. *New York Cas. Co.*, 139 F.2d 332, 334 (5th Cir. 1943); and *Woods* v. *Prelet,* 187 F.2d 453 (7th Cir. 1951). The Court of Appeals reviewed the allocation in the instant case and found no abuse of discretion. The Unions have not made anyway near a sufficient showing of abuse of the district court's discretion. Therefore, this Court should decline to review this issue.

Assuming *arguendo* that the district court did abuse its discretion in this case, an important question of federal law still is not presented. In future cases, whether or not a union should bear part of the master's fee will turn on the particular circumstances of the case. The Unions argue that a precedent has been set which will make Unions seek a passive role in such litigation. However, Unions in later cases might object to the appointment of a master if they are concerned about costs.

The Unions' real dilemma is that they want to have their cake and eat it too. They are willing to "assist" the EEOC in its complaint; but with the result that if the complaint fails the EEOC bears the costs and if the com-

plaint is settled the EEOC and the Employer bear the costs. The solution in a future case is for a union to decide first it it wishes to aid the EEOC. If so, it should ask to be realigned as a plaintiff. Then, if the EEOC prevails, it is likely the employer will bear the master's fee. In the instant case, the Unions failed in their attempt to be realigned as a plaintiff because they shared the responsibility for the conditions with Chrysler. No doubt, if Chrysler had been found to have prevailed in this action, the Unions would assert that they were co-defendants and could not be charged when the EEOC had "lost." Certainly, when no party has prevailed it is only fair to charge the Unions the same amount charged Chrysler.

CONCLUSION

The writ of *certiorari* should be denied.

Respectfully submitted,

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No. 80-221

In the Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND
CHRYSLER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHRYSLER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Petitioners contend that the district court abused its discretion in requiring them to pay $833 as their proportionate share of the compensation for the special master.

1. In October 1975, respondent Equal Employment Opportunity Commission commenced this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Commission charged that respondent Chrysler Corporation had discriminated against women at its facilities in Dayton, Ohio, with respect to hiring,

assignments, promotions, transfers, layoffs, and disability benefits. Petitioners, as the collective bargaining representative, were named as defendants pursuant to Fed. R. Civ. P. 19(a)(2) because of their interest in the outcome of the litigation. Although petitioners unsuccessfully sought to be formally realigned as parties plaintiff, they actively participated in the case in support of the Commission and filed a cross-claim against Chrysler (Pet. 3-5; Pet. App. 2a, 6a; Chrysler Br. in Opp. 2-3).

Pursuant to Fed. R. Civ. P. 53 and 42 U.S.C. 2000e-5(f)(5), the district court referred the case to a special master in August 1976 (Pet. App. 10a-11a). The order of referral provided (*id.* at 11a):

> The parties will pay a reasonable compensation and expenses to such Master. In the event the parties and the Master are unable to agree upon such sum, the Court will fix compensation and expenses and charge it to such of the parties as the Court may determine.

Petitioners did not oppose this referral to the master (*id.* at 2a).

In December 1977, the EEOC and Chrysler entered into a settlement agreement (Pet. App. 12a-24a). While Chrysler did not concede liability, it agreed to increase the percentage of female employees in its workforce and to conduct in a non-discriminatory manner its practices regarding hiring, job assignments, promotions, transfers, layoffs, and recalls. The agreement further provided that it did "not require Chrysler to violate any provisions of any current collective bargaining agreement between it and [petitioners]" (*id.* at 15a). Finally, the agreement stated that "[e]ach party agrees to bear its own costs and fees expended in the litigation of the instant action" (*id.* at

23a). Although petitioners were not parties to this agreement or privy to its negotiation, they joined in the motion to dismiss the case on the basis of the settlement agreement, which the district court granted (Pet. 8).

In May 1978, the district court approved a $2500 fee for the special master and ordered that each party—the Commission, Chrysler, and petitioners—pay one-third of that amount (Pet. App. 5a-7a). With respect to petitioners, the court concluded that it "ha[d] no means of knowing the extent of this defendant's participation before the Master but it appears that the participation in terms of pleadings before this Court was significant" (*id.* at 7a).

Petitioners appealed from this determination, contending that it should not be assessed any portion of the $2500 fee because "mere participation in the action did not justify assigning liability for costs" (Pet. App. 2a). Noting the district court's determination that petitioners "took an active part in the litigation" (*id.* at 3a), the court of appeals held that the district court had not "abused its discretion in assessing the $833.33 fee against [petitioners]" (*id.* at 4a), and it therefore affirmed the imposition of fees.

2. Petitioners recognize that the question they present is "novel" (Pet. 11) and "has not previously been decided" (*id.* at 12). Especially in these circumstances, the fact-bound issue whether the district court abused its discretion in apportioning fees does not warrant further review by this Court. See, *e.g.*, *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975).

It may be appropriate, however, for the Court to vacate the judgment below and remand the case to the lower courts for further proceedings. Subsequent to the filing of

the EEOC's brief in the court of appeals in October 1978, the Commission has addressed itself to the important need under Title VII to promote voluntary compliance by unions and employers. To this end, the Commission has recently adopted a "Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining." See BNA Daily Lab. Rep. No. 65, at D-2 (Apr. 2, 1980). As explained in the accompanying background paper, the Commission will seek to exercise its prosecutorial discretion in tion in this area in order to "spur unions and employers to undertake initiatives voluntarily towards eliminating discriminatory employment practices" (*id.* at D-1) and to allow the Commission to "take advantage, where feasible, of union (or employer) efforts and resources in pursuing Title VII claims" (*id.* at D-2; emphasis omitted).

Petitioners' efforts to align themselves with the Commission and actively to oppose Chrysler in this action are among the kind of "concerted, aggressive" activities to which the Resolution is directed (see Resolution, at D-1). The Commission believes that its policy of encouraging active efforts to enforce Title VII has a bearing on whether parties such as petitioners should be compelled to pay a part of the costs in cases such as this and that the district court, in exercising its authority to apportion fees, would benefit from an opportunity to consider the Commission's informed judgment regarding voluntary compliance efforts under Title VII.

Because the Resolution was adopted by the Commission subsequent to the filing of its brief in the court of appeals (and its substance was not reflected in the position taken by the Commission), the courts below did not have the opportunity to consider this factor in reaching their decision. In these circumstances, the Court may deem it appropriate for the lower courts to recon-

sider the issue in light of this changed circumstance, and we would not oppose such a remand.

Respectfully submitted.

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No. 80-221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 775 AND INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 758, *Petitioners,*

— AGAINST —

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND CHRYSLER CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-221

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 775 and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 758,

Petitioners,

-against-

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CHRYSLER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

This brief is submitted in reply to the Memorandum For The Equal Employment Opportunity Commission. The EEOC takes the position that the issue in this case does not warrant further review by this Court because it involves a "fact-bound issue" of "abuse of discretion" (at p. 3). The EEOC states,

however, that it would not oppose a remand for further proceedings in light of the new EEOC policy regarding union enforcement efforts.[1/]

1. The EEOC incorrectly characterizes the question presented in the Petition. While it is true that the allocation of liability for fees under Rule 53 is generally a matter of district court discretion, and thus is usually dependent upon the factual circumstances of each case, that discretion is necessarily circumscribed by the intended scope of Rule 53. The Petition in this case raises the question of whether Rule 53 authorizes a district court to impose liability for a master's fee upon a defendant that has not been charged with a law violation, or prevailed against in any respect in the litigation. Thus, the issue is neither "fact-bound" nor one of abuse of discretion, but a legal question appropriate for resolution by this Court in light of its significance to federal litigants generally, and to enforcement of employment discrimination laws in particular.

[1/] See EEOC Background Paper and Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining, BNA Daily Labor Reports, No. 65, p. D-1, April 2, 1980.

2. In our Petition we argued that the effect of the decision below will be to deter vigorous union support of EEOC efforts to eliminate discriminatory employment practices, contrary to the recently issued Commission Resolution, cited in n. 1, supra, which was designed to encourage and reward union support for Title VII enforcement. In its suggestion that the judgment below be vacated and the case remanded, the EEOC's memorandum confirms that the allocation of liability for costs in a case such as this should be determined with reference to that EEOC Resolution. See also Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae in Northwest Airlines, Inc. v. Transport Workers of America, AFL-CIO, No. 79-1056, at 27-28.[2/] While we believe that the

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[2/] In its Northwest brief, the Government argues against the implication of a right of contribution for an employer against a union in part because it would undermine this same EEOC policy. "[T]he risk of third-party liability and of the costs and efforts associated with resisting such liability would discourage employers and unions from the very efforts to expose and oppose discrimination that the Commission is seeking to encourage."

(2/ cont'd on next page.)

question presented as to the existence of district court authority to impose liability for fees on a non-culpable Title VII defendant is important and warrants plenary review, we do not oppose a remand as suggested by the EEOC.

Conclusion

The petition for certiorari should be granted.

(2/ cont'd from preceding page.)

Id. at 28. See also Brief for the International Union of Electrical, Radio and Machine Workers, AFL-CIO, No. 79-1056, at pp. 14-18. The decision below raises an even sharper conflict with the EEOC policy than would a pro-contribution decision in Northwest because it allows imposition of liability on a union not alleged to be guilty of a violation of Title VII, and solely because of its cooperation with EEOC enforcement efforts. Such a result is particularly ironic in light of the EEOC's explicit reliance on Petitioners' affirmative action activities as a model in formulating its general policy statement. See Brief for the United States and Equal Employment Opportunity Commission as Amicus Curiae in Northwest Airlines, Inc. v. Transport Workers of America, AFL-CIO, No. 79-1056, p. 6a.

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